MAY 9 PAGE 3

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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- 90-1444 -

THE STATE OF TEXAS, PETITIONER

VS.

CARY WAYNE COX, RESPONDENT

MOTION FOR LEAVE TO FILE
BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI IN FORMA PAUPERIS

TO THE HONORABLE SUPREME COURT;

NOW COMES Movant, CARY WAYNE COX, Respondent, by and through his court-appointed attorney, MICHAEL LOGAN WARE, and moves this Court, pursuant to Supreme Court Rule 39, for permission to file his Brief in Opposition to Petition for Writ of Certiorari in forma pauperis, and would respectfully show the Court as follows:

I.

In February, 1989 Respondent was convicted in State District Court of involuntary manslaughter. After his conviction,

Respondent indicated his desire to appeal and, after a contested evidentiary hearing, was found by the trial court to be indigent and was appointed the undersigned to represent him in the prosecution of his appeal through the State appellate courts. Said process included an indigency affidavit sworn to by Respondent.

II.

Although the undersigned maintained contact with Respondent for a period of time after his conviction, contact has now been lost and repeated efforts to reestablish contact have failed. Consequently, no additional indigency affidavit could be obtained from Respondent.

III.

The funds allotted to the undersigned as appointed counsel on appeal have already been paid and did not include the significant printing and filing costs normally associated with a Brief in Opposition to Petition for Writ of Certiorari. Neither did said funds purport to compensate the undersigned for time involved in pursuing this appeal past the State level.

IV.

Nevertheless, the undersigned believes that it would be appropriate to file with this Court a short Brief in Opposition to the State's Petition for Writ of Certiorari. The undersigned has attached his own affidavit in support of this Motion.

WHEREFORE, PREMISES CONSIDERED, counsel for Movant prays that this Motion be granted and that he be allowed to proceed in

this Court for purposes of filing his Brief in Opposition to Petition for Writ of Certiorari in forma pauperis.

Respectfully submitted,

MICHAEL LOGAN WARE
The Sinclair Building
512 Main Street, Suite 911
Fort Worth, Texas 76102
(817) 332-1221

By: Michael Logan Ware
MICHAEL LOGAN WARE
TX State Bar No. 20864200

ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of April, 1991, a true and correct copy of the foregoing Motion for Leave to File Brief in Opposition to Petition for Writ of Certiorari In Forma Pauperis was forwarded by United States Mail, postage prepaid, to Mr. C. Chris Marshall, Assistant District Attorney, Chief, Appellate Section, Tarrant County Justice Center, 401 W. Belknap, Fort Worth, Texas 76196.

Michael Logan Ware
MICHAEL LOGAN WARE

A F F I D A V I T

THE STATE OF TEXAS §

COUNTY OF TARRANT §

BEFORE ME, the undersigned Notary Public in and for said County and State, on this day personally appeared MICHAEL LOGAN WARE, who being by me duly sworn, deposes and says:

"I was the Respondent's original attorney at the trial of this cause. After Respondent's conviction, he indicated his desire to appeal and, after a contested evidentiary hearing, he was found by the trial court to be indigent and I was appointed to represent him in the prosecution of his appeal through the State appellate courts. Said process included an indigency affidavit sworn to by Respondent.

"Although I maintained contact with Respondent for a period of time after his conviction, I have now lost contact with the Respondent and my repeated efforts to reestablish contact have failed. Consequently, I have been unable to obtain a second indigency affidavit, but I have no reason to believe that Respondent's financial situation is any better than it was in February of 1989, when the original affidavit was signed.

"The funds originally allotted to me as court-appointed counsel on appeal have already been paid and did not include the significant printing and filing costs normally associated with a brief in opposition to petition for writ of certiorari. Neither did said funds purport to compensate the undersigned for time

involved pursuing this appeal past the State level. Nevertheless, the undersigned believes that it would be appropriate to file with this Court a short Brief in Opposition to the State's Petition for Writ of Certiorari."

Michael Logan Ware
MICHAEL LOGAN WARE

SUBSCRIBED AND SWORN TO BEFORE ME by the said MICHAEL LOGAN WARE on this 15th day of April, 1991.

Sally Monroe
Notary Public, State of Texas
My commission expires: 12/21/93

SALLY MONROE
Notary Public
STATE OF TEXAS
My Comm. Exp. 12/21/93

Typed or Printed Name of Notary

ROBERT W. RICKARD
MICHAEL LOGAN WARE, P.C.
Board Certified - Criminal Law
Texas Board of Legal Specialization

RICKARD & WARE
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April 15, 1991

90-1444

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk of the Court
United States Supreme Court
One First Street N.E.
Washington, DC 20543

Re: The State of Texas, Petitioner vs.
Cary Wayne Cox, Respondent

Dear Clerk:

I am forwarding to you with this letter the following documents with the request that they be filed of record regarding the captioned matter:

1. Motion for Leave to File Brief in Opposition to Petition for Writ of Certiorari in Forma Pauperis; and

2. Brief in Opposition to Petition for Writ of Certiorari.

You will also find enclosed a self-addressed envelope for your convenience in returning a file-marked copy of these documents to the undersigned.

Thank you for your assistance.

Sincerely,

Michael Logan Ware

MICHAEL LOGAN WARE

MLW:spm
Enclosures

cc: Mr. Chris Marshall
Asst. District Attorney
Chief, Appellate Section
Criminal Justice Center
401 West Belknap
Fort Worth, TX 76196

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

No. _____

THE STATE OF TEXAS (Petitioner) *vs.* CARY WAYNE COX (Respondent)

The Clerk will enter my appearance as Counsel of Record for CARY WAYNE COX

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature Michael Logan Ware

(Type or print) Name Michael Logan Ware

☒ Mr. ☐ Ms. ☐ Mrs. ☐ Miss

Firm Rickard and Ware

Address 512 Main Street, Suite 911

City & State Fort Worth, Texas Zip 76102

Phone (817) 332-1221

Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

MAY 9 PAGE 9

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO. _____

THE STATE OF TEXAS, PETITIONER

VS.

CARY WAYNE COX, RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. Sec. 1257(a), in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

REASONS FOR DENYING THE PETITION

The State of Texas has improperly petitioned this Court for a Writ of Certiorari in an effort to involve this Court in a case that contains no federal issue. Accordingly, this Court should dispose of the State's purported Writ, if for no other reason, as jurisdictionally improper.

Additionally, should this Court disagree and find that the Petitioner has, at least, proffered a jurisdictionally valid issue in its Petition, a careful reading of the unpublished, intermediate State court opinion upon which the State's Petition is based, reveals that this case does not even involve the proffered issue that the State is attempting to bootstrap into this Court through its Petition.

Finally, if this Court were to yield to the State's arguments, grant the Petition and reevaluate the legal sufficiency of the evidence in this case, this Court would ultimately reach the same result as that reached by the intermediate State appellate court in its published opinion below.

The State has attempted to invoke this Court's jurisdiction to review the decision of the intermediate State court's unpublished opinion pursuant to 28 U.S.C. Sec. 1257(a), which reads as follows:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty

> or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The only appellate issue ever raised by Respondent in his direct appeal from the Trial Court was the legal sufficiency of the evidence to sustain his conviction for involuntary manslaughter. The intermediate State appellate court decided this issue in favor of Respondent and reversed his conviction on this single ground. The Texas Court of Criminal Appeals then declined to exercise its discretionary authority to review the lower court's disposition of this single issue. There is quite simply no federal issue presented by Petitioner that fits within the language of this statute.

The only reference to anything that even sounds like federal law in the lower court's opinion is that court's passing reference to Jackson v. Virginia, 443 U.S. 307 (1979). The court makes this passing reference in its recitation of the Texas standard of review when sufficiency of the evidence is alleged as an issue on appeal in State court. The lower court stated as follows:

> In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. State, 672 S.W.2d 801, 803 (Tex. Crim. App. 1984); Houston v.

> State, 663 S.W.2d 455, 456 (Tex. Crim. App. 1984)(opinion on reh'g); Wilson v. State, 654 S.W.2d 465, 471-72 (Tex. Crim. App. 1983)(opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307,, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant. Johnson v. State, 673 S.W.2d 190, 195 (Tex. Crim. App. 1984); Jackson, 672 S.W.2d at 803.

Slip Op., of the court below attached to this Brief as Appendix A.

The State's contention that this language invokes the jurisdiction of this Court is erroneous for a number of reasons. First, the Jackson v. Virginia standard of review is simply a constitutional minimum. Neither Jackson nor any case found which cites Jackson has ever given any indication that Jackson is intended to demark a constitutional maximum beyond which the individual states dare not trod. In fact, it is basic hornbook law that the individual states are free to afford the individuals within its jurisdictional boundaries either more or greater rights than those afforded by the United States Constitution.[1]

---

[1] In this respect, the case at bar is clearly distinguishable from York v. Tate, 858 F.2d 322 (6th Cir. 1988) cert. denied, 490 U.S. 1049 (1989), relied on by the Petitioner in its Brief at pages 12-13. York was an appeal pursuant to 28 U.S.C. Sec. 2254 and simply held that the United States Constitution entitled a defendant to no greater protection than that articulated in Jackson v. Virginia. The York opinion did not purport to invalidate the Ohio common law rule of reviewing the sufficiency of circumstantial evidence.

Although there is possibly some controversy within the Texas courts as to whether the "reasonable hypothesis theory," vis-a-vis circumstantial evidence cases, is merely a Texas analytical construct to facilitate the application of Jackson or is, in fact, a different standard of review altogether, the resolution of this controversy, if it in fact exists, is one for the Texas courts to address independent of federal intervention.

Secondly, although the opinion of the court below recites the reasonable hypothesis construct as proper in Texas circumstantial evidence cases, the opinion does not purport to rely on this construct in concluding that the evidence in this particular case was insufficient as a matter of law. There is, in fact, absolutely nothing in the unpublished opinion below from which this Petition emanates to indicate that that court would have reached a different result even if the standard of review had been couched differently. For example, there was no explicit or even implicit attempt to directly apply this construct to the facts of the case-at-bar.

Therefore, even if the proffered State issue raised by Petitioner were somehow found to invoke the jurisdiction of this Court, because the opinion of the court below never addressed this issue, this case would be an inappropriate vehicle for the resolution of this issue.

Lastly, Respondent takes issue with the State's characterization of the facts of this case as they relate to the legal sufficiency of the evidence.

Under Texas law, a review of sufficiency of the evidence begins with the court's charge as given, Boozer v. State, 717 S.W.2d 608, 612 (Tex. Crim. App. 1984). The charge in the case-at-bar read, in pertinent part, as follows:

> The word "intoxication" as herein used means that the person charged does not have the normal use of his mental or physical faculties by reason of the voluntary introduction of any substance into his body.
>
> You are instructed that before you would be warranted in convicting the Defendant on involuntary manslaughter as charged in the indictment, you must find and believe from the evidence beyond a reasonable doubt that:
>
> . . . . . .
>
> (b) The Defendant, while so driving, was intoxicated, as that term is defined herein;
>
> (e) That the intoxication, if any, of the Defendant then there [sic] cause or contributed to cause the death of the said Tracey Higgins; or the Defendant, by the means aforesaid and by accident or mistake, by reason of such intoxication, cause the death of Tracey Higgins.

No witness testified that Respondent exhibited slurred speech, staggering, swaying, or any of the other characteristics traditionally associated with intoxication. No witness expressed the opinion that Respondent was ever intoxicated on the night in question.

In its Petition at page 4, the State draws this Court's attention to the fact that the arresting officer signed all the standard "DIC" forms at the hospital requesting a blood or breath specimen of the Respondent. This contention by the State is misleading for at least two reasons. First, the standard

language in all "DIC' forms quoted by the State on page 4 of its Petition is never evidence of intoxication. It is simply a prerequisite to obtaining a breath or blood sample. (R. Vol. IV, pp. 223-227). Second, on cross-examination, the officer admitted that he and the Respondent both signed all the wrong forms which Petitioner now contends this Court erred in not considering. (R. Vol. IV, pp. 223-227).

Perhaps most importantly, the officer himself, who signed the documents, and who testified for the State at trial never expressed the "opinion" at trial, or at any other time, that the Respondent was intoxicated. Petitioner is simply incorrect in asserting that a standard document signed by that officer can supplant the lack of evidence at trial.

Petitioner also makes much of the fact that jurors were told, by State's witnesses, that Respondent had an alcohol concentration of 0.19 and that under the Texas DWI law a person is intoxicated if his alcohol concentration is 0.10 or more. (State's Petition at 4).

First, the Texas DWI laws were not at issue in this case. Second, unlike a "per se" DWI case, the jury was not given any sort of instruction by the trial court as to the meaning of 0.19; nor was any such instruction requested by the State. Petitioner's argument to this Court that the evidence was sufficient because the jury could have inferred the legislative intent on a law that did not apply to the case in front of them

and then could have applied that inference to the case in front of them is incorrect.

Finally, Respondent did not testify in the case-at-bar and there were no eyewitnesses to the accident.[2]

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Respondent prays that this Petition be dismissed.

Respectfully submitted,

MICHAEL LOGAN WARE
The Sinclair Building
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By: Michael Logan Ware
MICHAEL LOGAN WARE
TX State Bar No. 20864200

ATTORNEY FOR RESPONDENT

---

[2] There was evidence at the hearing on the Motion to Suppress held outside the presence of the jury that Respondent had orally informed police officers at the scene that a car forced him off the road. (R. Vol. II; pp. 113-114; Vol. VIII; p. 11). This oral statement was suppressed along with other oral statements made by Respondent which would have placed the Respondent as the driver of the motorcycle at the time of the accident. (R. Vol. II; pp. 141-144). Said statements were neither disclosed to the jury nor considered by the appellate court on review. It is also worth noting that at trial Respondent attempted to introduce into evidence a properly authenticated accident report of a nearly identical motorcycle accident at the same intersection, which occurred one year, to the day, before the accident in question and which indicated the inherent dangerousness of the intersection. (R. Vol. V; pp. 365-370; Vol. VIII; pp. 51-55). Once again, since the trial court excluded this evidence, this information was neither disclosed to the jury nor considered by the appellate court on review. (Id.).

CERTIFICATE OF SERVICE

I hereby certify on this 15th day of April, 1991, a true and correct copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was forwarded by United States Mail, postage prepaid, to Mr. C. Chris Marshall, Assistant District Attorney, Chief, Appellate Section, Tarrant County Justice Center, 401 W. Belknap, Fort Worth, Texas 76196.

Michael Logan Ware

MICHAEL LOGAN WARE

APPENDIX A

NO. 2-89-072-CR

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

CARY WAYNE COX — APPELLANT

VS.

THE STATE OF TEXAS — STATE

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY

OPINION

Cary Wayne Cox was convicted by a jury of involuntary manslaughter. See TEX. PENAL CODE ANN. sec. 19.05 (Vernon 1974). The jury assessed punishment at six years confinement in the Texas Department of Corrections and a $5,000 fine both of which were probated for four years. Cox contends on appeal that the evidence was insufficient to support his conviction for involuntary manslaughter.

We reverse the judgment of the trial court because the evidence is insufficient to sustain his conviction.

On June 27, 1987, appellant, Cary Wayne Cox, and the victim, Tracey Dawn Higgins, attended a party where there was a keg of beer from which the party-goers drank. Sometime between 4:45 a.m.

and 5:00 a.m., Steve Adkins, a fellow party-goer, allowed Cox to take his motorcycle for a ride, and Cox took Higgins along with him.

The accident occurred approximately three blocks from the house where the party was held. Higgins was apparently thrown from the motorcycle and died within one and a half hours after the accident occurred. Testimony revealed that Cox left the scene even though he had also been hurt. He was later found, treated by paramedics, and subsequently taken to Harris Hospital. At the hospital, a blood test was taken which resulted in a 0.19% weight volume ethyl alcohol or 0.19 grams of alcohol per 100 milliliters of blood.

In reviewing the sufficiency of the evidence in either a direct or circumstantial evidence case, we must view the evidence in the light most favorable to the prosecution and consider whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. State, 672 S.W.2d 801, 803 (Tex.Crim.App. 1984); Houston v. State, 663 S.W.2d 455, 456 (Tex.Crim.App. 1984)(opinion on reh'g); Wilson v. State, 654 S.W.2d 465, 471-72 (Tex.Crim.App. 1983)(opinion on reh'g). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia,

443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). However, a conviction based on circumstantial evidence cannot be sustained if the circumstances do not exclude every other reasonable hypothesis except that of the guilt of the defendant. Johnson v. State, 673 S.W.2d 190, 195 (Tex.Crim.App. 1984); Jackson, 672 S.W.2d at 803.

Appellant contends there is insufficient evidence to prove that he was intoxicated at the time of the accident, or that he was the driver of the motorcycle at the time of the accident. We will not discuss appellant's argument that the State failed to prove he was the driver of the motorcycle at the time of the accident because we find the evidence was insufficient to establish that Cox was intoxicated at the time of the accident.

Cox was convicted of involuntary manslaughter under the former version of TEX. PENAL CODE ANN. sec. 19.05 which provided in part:

> (a) A person commits an offense if he:
>
> (2) by accident or mistake when operating a motor vehicle while intoxicated and, by reason of such intoxication, causes the death of an individual.
>
> (b) For purposes of this section, "intoxication" means that the actor does not have the normal use of his mental or physical facilities by reason of the voluntary introduction of any substance into his body.

Ch. 426, art. 2, sec. 1, 1973 Tex. Gen. Laws 1122, 1124, amended by ch. 307, sec. 1, 1987 Tex. Gen. Laws 1698.

A review of the record reveals that Cox's ex-girlfriend saw him drink a quarter of a cup of beer and testified that, based on his actions in which Cox chased her around the car, he could have been intoxicated. Adkins, the owner of the motorcycle, testified that he and Cox drank one and one-half beers before Cox left on the motorcycle. He testified he remembered Cox was not drinking earlier because he remembered thinking it was kind of odd not to see him drink. In addition, there was testimony by a police officer, a paramedic, and a witness who came upon the scene of the accident that Cox smelled of alcohol.

Cox concedes there was evidence he had been drinking beer around the time of the accident. However, Cox contends there was no evidence that he had lost the normal use of his mental or physical faculties because of the beer. Therefore, he argues the evidence was insufficient that he was either intoxicated at the time of the accident or that the alleged intoxication actually caused the accident.

The State concedes the expert testimony that the 0.19% blood alcohol concentration which was over the legal limit was not by itself sufficient to show that Cox had lost the normal use of his mental or physical faculties under the definition of "intoxication" in the involuntary manslaughter statute at the time of the offense. However, the State asserts that the testimony that Cox had consumed beer before the accident, the testimony by the police

officer, paramedic, and another witness that Cox smelled of alcohol, and the fact that the blood test revealed 0.19% alcohol rendered the evidence sufficient to sustain the conviction for involuntary manslaughter.

The State directs our attention to Martin v. State, 724 S.W.2d 135 (Tex.App.--Fort Worth 1987, no pet.) and Irion v. State, 703 S.W.2d 362 (Tex.App.--Austin 1986, no pet.). In Martin, the court held the testimony of the arresting officer that the defendant stumbled as he got out of his car, staggered and swayed as he stood, slurred his speech, had bloodshot and watery eyes, and failed three field sobriety tests, together with the testimony of the expert witness who stated that someone who tested at 0.21% on an intoxilyzer test, would not have the normal use of his mental or physical faculties by means of the introduction of alcohol into his system, constituted sufficient evidence to establish the defendant's intoxication at the time of his arrest. Martin, 724 S.W.2d at 137.

Furthermore, the court in Irion held that the opinion testimony of the arresting officer standing alone was sufficient to prove the element of intoxication. Irion, 703 S.W.2d at 364. However, in Irion, as in Martin, the arresting officer testified that the defendant was weaving while driving, had bloodshot eyes, smelled of alcohol, swayed, and failed a field sobriety test. Both of these cases can be distinguished from the present case

because in the present case the only testimony from the officer was that Cox smelled of alcohol. There was no testimony from either the officer, the paramedic, or the other witness that Cox was staggering, swaying, slurring his speech, or had bloodshot eyes. In addition, there was no testimony in the present case as to what effect someone who tested at 0.19% on an intoxilyzer test would have on the normal use of his mental or physical faculties.

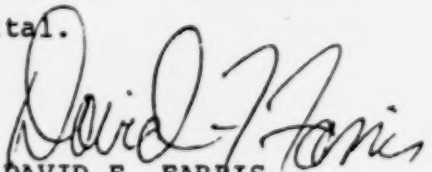
Cox relies on McCafferty v. State, 748 S.W.2d 489, 491 (Tex.App.--Houston [1st Dist.] 1988, no pet.), for the proposition that since the State failed to explain absorption and metabolism rates of intoxication or in any way connect the blood test results to his condition some two hours earlier, the blood test results were insufficient to establish either intoxication at the time of the accident or that the alleged intoxication actually caused the accident. In McCafferty, the court held that the officer's testimony that the defendant was intoxicated when the officer arrived at the accident at 3:50 a.m. together with the breath test showing that the defendant was intoxicated at 4:45 a.m. were alone not sufficient to establish that the defendant was intoxicated at 2:30 a.m. when driving. Id. at 491.

The court further held that the State's expert witness did not explain absorption and metabolism rates or in any way connect the breath test results at 4:45 a.m. to the defendant's condition when driving at 2:30 a.m. and therefore, concluded the State

failed to show that the defendant was intoxicated while driving and found the evidence to be insufficient to support the conviction.

Because the involuntary manslaughter statute in effect at the time of the accident did not provide for having an alcohol concentration of 0.10% or more as a means of proving intoxication, the fact that Cox tested at 0.19% is alone not sufficient without some testimony regarding the effect a 0.19% alcohol concentration would have on a person's mental or physical faculties. Therefore, after a careful review of the record, we hold the evidence was insufficient to sustain his conviction for involuntary manslaughter. Cox's point of error is sustained.

Finding insufficient evidence to sustain appellant's conviction for involuntary manslaughter, we reverse and remand the judgment of the trial court with an order instructing the trial court to enter a judgment of acquittal.



DAVID F. FARRIS,
JUSTICE

PANEL A
FARRIS, DAY, JJ.; LATTIMORE, J. (Not Participating)
DO NOT PUBLISH
TEX. R. APP. P. 90(e)

JUN 14 1990